

## Rule 23. Class Actions

**(b) CLASS ACTIONS MAINTAINABLE.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

\* New material is underlined. Superseded material is struck out.

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15                   certification;  
16                   ~~(A~~B~~)~~ ~~the interest of members of the class in~~  
17                   ~~individually controlling the prosecution or~~  
18                   ~~defense of~~ class members' interests in  
19                   maintaining or defending separate actions;  
20                   ~~(B~~C~~)~~ ~~the extent, and nature, and maturity of~~  
21                   any related litigation concerning ~~the~~  
22                   ~~controversy already commenced by or against~~  
23                   involving class members of the class;  
24                   ~~(C~~D~~)~~ ~~the desirability or undesirability of~~  
25                   concentrating the litigation of the claims in the  
26                   particular forum;  
27                   ~~(D~~E~~)~~ ~~the difficulties likely to be encountered in~~  
28                   the management of a class action; and  
29                   ~~(E~~ F ~~)~~ whether the probable relief to individual  
30                   class members justifies the costs and burdens  
31                   of class litigation; or

32                    (4) the parties to a settlement request certification  
33                    under subdivision (b)(3) for purposes of settlement,  
34                    even though the requirements of subdivision (b)(3)  
35                    might not be met for purposes of trial.

36                    **(c) DETERMINATION BY ORDER WHETHER CLASS ACTION**  
37                    **TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS**  
38                    **CONDUCTED PARTIALLY AS CLASS ACTIONS.**

39                    (1) ~~As soon as~~ When practicable after the  
40                    commencement of an action brought as a class action,  
41                    the court shall determine by order whether it is to be  
42                    so maintained. An order under this subdivision may  
43                    be conditional, and may be altered or amended before  
44                    the decision on the merits.

45                    \* \* \* \* \*

46                    **(e) DISMISSAL OR COMPROMISE.** A class action shall not  
47                    be dismissed or compromised without hearing and the  
48                    approval of the court, ~~and~~ after notice of the proposed

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49           dismissal or compromise ~~shall be~~ has been given to all  
50           members of the class in such manner as the court directs.

51           **(f) Appeals.** A court of appeals may in its discretion permit  
52           an appeal from an order of a district court granting or denying  
53           class action certification under this rule if application is made  
54           to it within ten days after entry of the order. An appeal does  
55           not stay proceedings in the district court unless the district  
56           judge or the court of appeals so orders.

**COMMITTEE NOTE**

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of aggregating large numbers of small claims that would not support individual litigation. The experience of more than three decades, however, has shown ways in which Rule 23 can be improved. These amendments may effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. New factors are added to the list of matters pertinent to determining whether to certify a class under subdivision (b)(3). Settlement problems are addressed, both by confirming the propriety of "settlement classes" in subdivision (b)(4) and by making explicit the

need for a hearing as part of the subdivision (e) approval procedure. The requirement in subdivision (c)(1) that the determination whether to certify a class be made as soon as practicable after commencement of an action is changed to require that the determination be made when practicable. A new subdivision (f) is added, establishing a discretionary interlocutory appeal system for orders granting or denying class certification. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*. The study provided much useful information that has helped shape these amendments.

*Subdivision (b)(3).* Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts by courts and lawyers to adapt Rule 23 to address the problems that arise from torts

that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member recovery figures reported by the Federal Judicial Center study ranged from \$315 to \$528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however, the court should consider the possibility of excluding these victims from the class definition.

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

These concerns underlie the changes made in the subdivision (b)(3) list of matters pertinent to the findings whether the law and fact questions common to class members predominate over individual questions and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. New factors are added to the list, and some of the original factors have been reformulated.

Subparagraph (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages — but does not forbid — class certification when individual class members can practicably pursue individual actions. If individual class members cannot practicably pursue individual actions, on the other hand, this factor encourages class

certification. This encouragement may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation.

Subparagraph (B), revised from former subparagraph (A), complements new subparagraph (A). The practical ability of individual class members to pursue individual actions is important when class members have significant interests in maintaining or defending separate actions. These interests include such fundamental matters as choice of forum; the timing of all events from filing to judgment; selection of coparties and adversaries; the ability to gain choice of more favorable law to govern the decision; control of litigation strategy; and litigation in a single proceeding that includes all issues of liability and remedy. These interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the limited sense that fewer judicial resources are required. The right to request exclusion from a (b)(3) class does not fully protect these interests, particularly as to class members who have not yet retained individual counsel at the time of class notice. These interests of class members may be served by a variety of alternatives that may not amount to individual control of separate litigation. The alternatives to certification of the requested class may be certification of a different class or smaller classes, intervention in other pending actions, voluntary joinder, and consolidation of individual actions — including transfer for coordinated pretrial proceedings or transfer for consolidated trial.

The practical ability of individual class members to pursue individual litigation and their interests in maintaining separate actions may come into conflict when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. The



plaintiffs who might win the race to secure and enforce individual judgments have an interest that is served at the cost of other plaintiffs whose interests are defeated by exhaustion of the available assets. In these circumstances, fairness and efficiency may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is related and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Subparagraph (F) has been added to subdivision (b)(3) to

effect a retrenchment in the use of class actions to aggregate trivial individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. No particular dollar figure can be used as a threshold. A smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive. Often it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence. The opportunity to decertify later should not weaken this threshold inquiry. At the same time decertification should be considered whenever the factors that seemed to justify an initial class certification are disproved as the action is more fully developed.

*Subdivision (b)(4).* Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement

purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir.1982); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170-171, 173-178 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation.

Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement. Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a trial class without adequate reconsideration. These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3), but the court also must take particular care in applying some of Rule 23's

requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or — if the class is certified under subdivision (b)(3) — whether to request exclusion. One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

*Subdivision (c).* The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is amended to provide for certification "when practicable."

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment makes this approach secure, and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A),

(B), (C), and (F). These and similar inquiries should not be made under pressure of an early certification requirement. Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon as practicable."

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision. A few courts have feared that this useful practice is inconsistent with the "as soon as practicable" requirement.

*Subdivision (e).* Subdivision (e) is amended to confirm the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The judicial responsibility to the class is heavy. The parties to the settlement cease to be adversaries in presenting the settlement for approval, and objectors may find it difficult to command the information or resources necessary for effective opposition. These problems may be exacerbated when a proposed settlement is presented at, or close to the beginning, of the action. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

*Subdivision (f).* This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district

court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation. Such questions are most likely to arise during the early

years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).